Supreme Court, U.S.
FILED
FEB 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1415

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET ALICE WOLFENBARGER and
JOHN WOLFENBARGER,
Petitioners

vs.

STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WARREN H. CRANE
812 S.W. D Avenue
Lawton, Oklahoma 73501
(405) 355-9119
Attorney for Petitioners

February, 1986

QUESTION PRESENTED

Will a State of the United States be permitted to impose criminal penalties against a citizen for resisting, in a reasonable manner, the violation of that citizen's substantive Fourth Amendment rights to not have his property seized by state police agents without a warrant or other judicial process?

PARTIES

All the parties are listed in the caption.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

HISTORY OF THE CASE 3

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 6

CERTIFICATE OF SERVICE follows Petition.

APPENDIX A:
Order of the Oklahoma Court of Criminal Appeals Denying Petition for Rehearing.

APPENDIX B:
Opinion of the Oklahoma Court of Criminal Appeals.

APPENDIX C:
Motion for New Trials (District Court of Comanche County, Oklahoma).

TABLE OF AUTHORITIES

Cases PAGE(S)

Wolfenbarger v. *Williams, et al.*,
774 F.2d 358 (10th Cir. 1985) 5

Coolidge v. *New Hampshire*,
403 U.S. 443 (1971) 5

United States v. *Jacobsen*,
80 L.Ed.2d 85 (1984) 5

Mapp v. *Ohio*,
367 U.S. 643 (1961) 6

United States Constitution

Fourth Amendment 2

United States Code

28 U.S.C. § 1257(3) 1

Oklahoma Statutes

21 Okla.Stat. 1981 § 643(3) 2

21 Okla.Stat. 1981 § 1092 2

No. .....

In the
Supreme Court of the United States
OCTOBER TERM, 1985

MARGARET ALICE WOLFENBARGER and
JOHN WOLFENBARGER,
Petitioners

vs.

STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

OPINION BELOW

The decision of the Oklahoma Court of Criminal Appeals was rendered on the 6th day of November, 1985 and published in the Oklahoma Bar Journal, Vol. 56—No. 43, but has not yet been reported in the Pacific Reporter 2nd series. (It appears as Appendix B hereto.)

A petition for rehearing was denied on the 23rd day of December, 1985. (Appendix A hereto.)

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States is as follows:

> . . . right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 21 Okla.Stat. 1981 § 643(3) is as follows:

> To use or attempt to offer to use force or violence upon or toward the person of another is not unlawful in the following cases:
>
> * * *
>
> 3. When committed either by the party about to be injured, or by any other person in his aid or defense, in preventing or attempting to prevent an offense against his person, or any trespass or other unlawful interference with real or personal property in his lawful possession; provided the force or violence used is not more than sufficient to prevent such offense.
>
> * * *

Title 21 Okla.Stat. 1981 § 1092 is as follows:

> Every pawnbroker or person carrying on the business of a pawnbroker, and every junk dealer, who having received any goods which have been embezzled or stolen refuses or omits to exhibit them, upon demand, during the usual business hours, to the owner of said goods or his agent authorized to demand an inspection thereof, or any peace officer, is guilty of a felony.

HISTORY OF THE CASE

John and Margaret Wolfenbarger operate Shady Sam's Pawn Shop in Lawton, Oklahoma.

On the 1st day of November, 1982, Deputy Sheriff Dale Sims telephoned John Wolfenbarger and asked if the pawn shop had received a certain Olympus camera. Being answered in the affirmative he placed a "hold" on the camera. A "hold" is an official request to keep an item until it can be determined whether or not that item is or will be necessary as evidence in a State criminal action.

Two days later, on the Third of November, 1982, Sims, Deputy Thomas, and District Attorney's Investigator Erdmann, went to the shop and asked to see the camera. The camera was obtained from the pawn room and handed to Erdmann. He showed it to a young man the three had in custody. Erdmann told John Wolfenbarger that they were going to confiscate the camera. John said they weren't and tried to lock the door to the shop to prevent the three from taking the camera. Erdmann set the camera down to psysically prevent John from locking the door. Margaret picked up the camera, tossed it behind the pawn door and stood in front of the pawn door. The three arrested John and Margaret and confiscated the camera. John and Margaret were each charged with interfering with a public officer, tried to a jury which assessed their punishment at the maximum, Five-hundred-dollar fine and six months in jail each.

Appeal was made to the Oklahoma Court of Criminal Appeals which combined the individual appeals and affirmed. The camera was not used as evidence against the

Wolfenbargers. It has not been returned to them. They have received no notice of any hearing in reference to their claim to the camera.

Prior to entering their pleas of not guilty herein, each defendant interposed his demurrer which was overruled by the trial court. Each defendant did, in their combined motion for new trial at Paragraph 10, allege as follows:

> That these convictions contravene these defendants' rights under Article 2, Section 30 of the Oklahoma Constitution, and Amendments 4, 5 and 14 of the Federal Constitution.

That each defendant used that exact language in his Petition-in-Error to the Oklahoma Court of Criminal Appeals.

REASONS FOR GRANTING THE WRIT

The reasons for Certiorari would contain the Federal question of whether or not the requirements of the Fourth Amendment must be met when state agents confiscate property that has been pledged to a pawnbroker.

This is not a question of the enforcement of the exclusionary rule under which the Fourth Amendment claims usually arise. Instead this is a question of whether or not a pawnbroker has a constitutionally protected property interest in a pledge when police agents have non-judicially determined that the pledge is stolen property. The Oklahoma Court of Criminal Appeals has ruled indirectly that the pledgee pawnbroker has no such rights. Yet on September 26, 1985, the United States Court of Appeals for the Tenth Circuit ruled that an honest pawnbroker in Ok-

lahoma does have a constitutionally protected property interest in pledged property, even stolen property, as against the whole world excepting only the true owner. *Wolfenbarger* v. *Williams, et al.*, 774 F.2d 358 (1985).

In *Collidge* v. *New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), we have as follows at paragraph (15):

> The second limitation is that the discovery of evidence in plain view must be inadvertent. The rationale of the exception to the warrant requirement, as just stated, is that a plain view seizure will not turn an initially valid (and therefore limited) search into a "general" one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "per se unreasonable" in the absence of "exigent circumstances."

In light of *Coolidge* and the fact the police agents had known for two days where the camera was, it is difficult to perceive how the "plain view" doctrine could be applicable.

A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property. *United States* v. *Jacobsen*, 80 L.Ed. 2d 85 (1984).

Obviously the police agents seized property in which the Wolfenbargers had a lawful possessory interest. The

agents had no warrant. There were no exigent circumstances. The Wolfenbargers claimed their Fourth Amendment rights by resisting as they had a right to do under Oklahoma law. Six months in jail and a five-hundred-dollar fine is their reward.

In 1961 *Mapp* v. *Ohio*, 367 U.S. 643, ____ S.Ct. 1684, 6 L.Ed.2d 1081, made the Fourth Amendment applicable to citizens as against state agents.

CONCLUSION

It is suggested that the within decision by the Oklahoma Court of Criminal Appeals has removed Oklahoma from those who have that protection or at least the prospect of reliance on the Fourth Amendment has been chilled to a great extent.

Respectfully submitted,

WARREN H. CRANE
812 S.W. D Avenue
Lawton, Oklahoma 73501
(405) 355-9119

Attorney for Petitioners

February, 1986

CERTIFICATE OF SERVICE

I, Warren H. Crane, counsel for petitioners herein, John Wolfenbarger and Margaret Wolfenbarger, hereby certify that, on this 21st day of February, 1986, I mailed three (3) copies of the foregoing Petition for Writ of Certiorari to,

Michael C. Turpen
Attorney General of Oklahoma
and
Susan Brimer Agosta
Assistant Attorney General
Room 112, State Capitol Bldg.
Oklahoma City, Oklahoma 73105
Attorneys for Respondent

by depositing same in the U.S. Mail, postage fully prepaid.

All parties required to be served have been served.

.....

Warren H. Crane

APPENDIX A

[Filed Dec. 23, 1985]

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

MARGARET ALICE WOLFENBARGER, and JOHN WOLFENBARGER,	)	
Petitioner,	)	NO. M-83-413
-vs-	)	and
	)	NO. M-83-414
STATE OF OKLAHOMA,	)	
Respondent.	)	

ORDER DENYING APPLICATION FOR REHEARING
AND DIRECTING ISSUANCE OF MANDATE

Now, on this, the 17th day of December, 1985, having examined the petitioner's joint application for rehearing in the above styled and numbered causes, and having been fully advised of the premises, this Court finds that it should be, and the same is, hereby denied.

The Clerk of this Court is ordered to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 23rd day of December, 1985.

(s) *Tom Brett*
TOM BRETT, Judge

(s) *Hez Bussey*
HEZ BUSSEY, Judge

(s) *Ed Parks*
ED PARKS, Presiding Judge

ATTEST:
(s) *Frances Patterson*, Clerk

APPENDIX B

[Filed Nov. 6, 1985]

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

MARGARET ALICE WOLFENBARGER, and JOHN WOLFENBARGER,	)	
Appellants,	)	
-vs-	)	NO. M-83-413
	)	NO. M-83-414
STATE OF OKLAHOMA,	)	
Appellee.	)	

OPINION

PARKS, PRESIDING JUDGE:

The appellants, Margaret Alice Wolfenbarger and John Wolfenbarger, were tried together in the District Court of Comanche County, Oklahoma, Case Numbers CRM-82-1323 and CRM-82-1324, respectively. They were each convicted of Obstructing a Police Officer in Performance of His Duty, in violation of 22 O.S.1981, § 540. Each was fined $500 and sentenced to a term of six months incarceration in the custody of the Comanche County Sheriff. Although they appeal separately, we have consolidated their cases because our holding applies to both.

Margaret Wolfenbarger has city and state pawnbroker's licenses. She owns and operates Shady Sam's Pawn Shop in Lawton; her husband, John Wolfenbarger, works with her. In early November they received a telephone request to put a hold on a camera pawned by Gary M. Elrod. Several days later, they were visited by two deputy sheriffs, Michael Thomas and Harold Sims, a Paul Chatham, whom they had in custody, and Nelson Erdmann, an investigator in the District Attorney's office. When Erdmann asked appellant to show him the camera that was on hold, Mr. Wolfenbarger handed it over. Erdmann showed the camera to Chatham, who indicated that it was the camera he and Elrod had stolen and pawned there earlier.

Erdmann instructed Officer Thomas to write a property receipt. At this point, appellant, John, verbally objected to the officer's taking custody of the camera and tried to grab for it. Erdmann was able to keep the camera out of his reach. John then walked to the front of the shop. Erdmann put the camera down on the counter and followed John, as John tried unsuccessfully to lock the front door. He told the officers that they were not leaving the store. After Erdmann told appellant John that he was under arrest for interfering with an officer, a scuffle ensued between the two men, at which time the store's plate glass window was broken.

When the officers returned from placing the husband in their car, Thomas observed Mrs. Wolfenbarger remove the camera from where Erdmann had left it, open a door behind the counter, and throw the camera inside. She blocked the door and would not let the officers have the camera nor get past her to the door, even though they asked her to stand aside several times. The officers arrested her also for interfering with the performance of their duty.

For their first assignment of error, the appellants contend the trial court erred in overruling their demurrers to their respective criminal informations. Under this proposition, they argue that they were not charged under the most appropriate statute, and that the informations were insufficient. As to their first point, we need only note that the prosecutor has sole authority to decide under which statute to file charges. *Gowler* v. *State*, 589 P.2d 682 (Okl. Cr. 1978). As to the second point, this Court has repeatedly stated that the test to assess the sufficiency of the information is two-pronged: (1) whether the defendant was in fact misled by it, and (2) whether conviction under it would expose the defendant to the possibility of being put in jeopardy a second time for the same offense. *Jefferson* v. *State*, 675 P.2d 443 (Okl.Cr. 1984). The test is not

whether the information could have been made more definite or certain, but whether it contained the elements of the offense. *Short* v. *State*, 634 P.2d 755 (Okl.Cr. 1981). We find that both informations did contain the necessary elements to apprise the appellants of the charges against them. There is nothing in the record to indicate that either appellant was in fact misled by the charges as they were set forth. We also find the informations were sufficient to preclude the possibility of appellants being in futher jeopardy for the same offenses.

In their second proposition of error, appellants allege the trial court made several erroneous rulings. It is well established that this Court will not disturb the discretionary rulings of the trial court without a showing that such rulings were arbitrary or capricious. *Morgan* v. *State*, 555 P.2d 1307 (Okl.Cr. 1976). We will, however, review the record for any fundamental errors resulting from an abuse of discretion. We have done so in the case at hand, and find none. Unfortunately, appellants have chosen to support their allegations merely with lengthy excerpts from the trial transcript. Moreover, they have failed utterly to provide any citations of authority. In the absence of fundamental error, we have often warned that where an appellant cites no authority for his assignments of error, we will not search the books for him. *Brannon* v. *State*, 670 P.2d 601 (Okl.Cr. 1983). We will not do so now.

Appellant's third proposition of error, like their second, combines several different allegations which are not clearly presented. They have not cited authority appropriate to elucidate or support their contentions. Again, we will not consider on review arguments which are neither presented clearly nor supported properly. *Hawkes* v. *State*, 644 P.2d 111 (Okl.Cr. 1982). In reviewing the record for fundamental error, we note that none of appellant's requested jury instructions were germane, and they were correctly refused by the trial court. This proposition of error is without merit.

This Court finds no reversible errors and AFFIRMS the jury verdicts. Both cases are REMANDED, however, to the trial court to correct the judgment and sentence decrees. Both decrees recite that appellants were convicted of "Interfering with a Police Officer." The offense on which the appellants were convicted was "Obstructing a Public Officer in the Performance of His Duty."

CONSOLIDATED APPEALS FROM THE DISTRICT COURT OF COMANCHE COUNTY
THE HONORABLE ALLEN McCALL, DISTRICT JUDGE

MARGARET ALICE WOLFENBARGER and JOHN WOLFENBARGER, appellants, were convicted of Interfering with a Police Officer in Comanche County District Court, Case Numbers CRM-82-1323 and CRM-82-1324, and each sentenced to a fine of $500 and six months incarceration in the custody of the Comanche County Sheriff, and appeals. AFFIRMED. The case is REMANDED, however, to the trial court in order that the judgments and sentences may be corrected to "Obstructing a Public Officer in the Performance of His Duty."

WARREN H. CRANE
ASSISTANT PUBLIC DEFENDER
812 D AVENUE
LAWTON, OK 73501
ATTORNEY FOR APPELLANT

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA
SUSAN BRIMER AGOSTA
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: PARKS, P.J.
BRETT, J.: CONCURS
BUSSEY, J.: CONCURS

APPENDIX C

[Filed March 25, 1983]

IN THE DISTRICT COURT IN AND FOR
COMANCHE COUNTY, OKLAHOMA

THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	Nos.
-vs-	)	CRM-82-1323
	)	AND
MARGARET ALICE WOLFENBARGER,	)	CRM-82-1324
AND JOHN WOLFENBARGER,	)	
Defendants.	)	

MOTIONS FOR NEW TRIALS

Come now the defendants and move the court to grant new trials herein by reason of the errors at law committed during the trials, over the objection of the defendants, to the detriment of these defendants, which were as follows, to-wit:

1. Overruling demurrers to complaints prior to entering a plea by defendants.
2. Overruling defendants' Motions for acquittal (Demurrer to the Evidence) at the close of the State's cases in chief.
3. Not granting defendants' Motions for Directed Verdicts of Acquittal at the close of all the evidence.
4. Refusing defendants' requested instructions 1, 2 & 3.
5. Admission of incompetent evidence (hearsay) over objection of counsel.
6. Not permitting the defendants to argue all the aspects of their cases to the jury.
7. Permitting the prosecutor to argue his personal opinion to the jury without admonishment when objected to by counsel for defendants.

8. Instructing the jury that whether or not the officers had a warrant or court order was immaterial in these cases.

9. Ruling that a District Attorney's investigator was a public officer as a matter of law.

10. That these convictions contravene these defendants' rights under Article 2, Section 30 of the Oklahoma Constitution, and Amendments 4, 5 and 14 of the Federal Constitution.

(s) *Warren H. Crane*
Warren H. Crane
Attorney for Defendants